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**United Nations common system**

# United Nations common system

## Note by the Secretary-General

1. On behalf of the Administrative Committee on Coordination, the Secretary-General has the honour to place before the Fifth Committee for its consideration and possible recommendation to the General Assembly for adoption an amendment to the statute of the International Civil Service Commission that would allow the Commission and participating organizations to request advisory opinions from an ad hoc advisory panel composed of judges of the Administrative Tribunals of the United Nations and of the International Labour Organization (ILO), to be designated by the President of respective Administrative Tribunal, and a third person chosen by those Presidents. The text of the proposed amendment is contained in annex I to the present note.

2. The International Civil Service Commission was established, and its statute adopted, by General Assembly resolution 3357 (XXIX) of 18 December 1974, with the general objective of regulating and coordinating the conditions of service of the United Nations common system. The Commission makes recommendations to the General Assembly, *inter alia*, on the broad principles for the determination of conditions of service in the common system, salary and post adjustment scales, dependency allowances and language incentives for the Professional and higher categories, education and repatriation grants and termination indemnities. The Commission also makes recommendations to the executive heads of the participating agencies, *inter alia*, on the salary scales of General Service staff, standards of recruitment and career development, training and staff evaluation. It has the power to take decisions, *inter alia*, on the methods by which the principles for determining conditions of service should be applied, the rates of allowances and benefits, other than pensions and the allowances mentioned above, the classification of duty stations for the purpose of applying post adjustments and the establishment of the relevant facts for General Service salary scales (salary surveys) at headquarters duty stations.

3. All of the specialized agencies of the United Nations, with the exception of the World Bank, the International Monetary Fund, the International Finance Corporation, the International Development Association and the International Fund for Agricultural Development, have accepted and are thus bound by the statute of the Commission. The International Atomic Energy Agency is also a party to the statute.

4. Under article 26 of its statute, the Commission is required not to prejudice the acquired rights of staff under the staff regulations of the organizations concerned when making its decisions, as indeed are the executive heads in applying those decisions.

5. Under the statute and under their own staff regulations, the executive heads of the participating organizations are legally bound to give effect to decisions of the Commission

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taken within its competence. They are also in practice bound, in order to preserve the integrity of the common system, to give effect to recommendations made to them directly by the Commission and to decisions based on Commission recommendations that are taken by the General Assembly. The participating organizations implement these decisions and recommendations through measures taken under their respective staff regulations. Once applied to staff, these measures can be appealed by staff members in individual cases through the internal appeals procedures and eventually to the United Nations or ILO Administrative Tribunals.

6. On a number of occasions, the Administrative Tribunals have held that decisions and recommendations of the Commission applied by executive heads to their staff have illegally deprived their staff of their rights. Consequently, the implementation of those decisions or recommendations was overturned. In so doing, the ILO Administrative Tribunal has consistently stressed the responsibility of the executive heads, even where they are constrained by the statute of the Commission and by their staff regulations to apply decisions of the Commission that fall within its competence, to review such decisions before applying them.

7. It is to be noted that while the executive head is required to review decisions and recommendations of the Commission for their legality and not to apply them if they would deprive staff of their legal rights, there is no judicial forum in which the executive head, as opposed to his or her staff, can contest the legality of such decisions. Decisions of the Commission cannot be appealed by the executive head himself to an administrative tribunal; nor is there any provision in the statutes of the Administrative Tribunals for the giving of advisory opinions on this or indeed other matters.

8. The legal advisers within the United Nations system noted that the implementation by participating organizations of decisions and recommendations of the International Civil Service Commission is subject to judicial review by the Administrative Tribunals at the instance of staff members who felt themselves aggrieved. There was thus in existence an appropriate judicial forum in which legal questions raised by the decisions or recommendations could be settled. The problem lies in allowing for an authoritative statement of the law to be made before the decision or recommendation is made, or at least before it is implemented by the participating organizations, rather than after the event, and to allow for both the Commission and individual participating organizations to call for such an authoritative statement as necessary.

9. Having considered these matters at their annual meetings, the legal advisers within the United Nations system reported to the Administrative Committee on Coordination at its first and second regular sessions of 1998. The Administrative Committee requested that the views of the Presidents of the United Nations and ILO Administrative Tribunals should be obtained on an urgent basis. The legal advisers therefore consulted the Presidents of the United Nations and ILO Administrative Tribunals on their proposals. Broadly speaking, the Presidents appreciated the difficulties identified by the legal advisers. They raised, however, several concerns regarding, in particular, the proposal that the advisory panel be composed of the Presidents of the Administrative Tribunals themselves. In the light of the views expressed by the Presidents of the Administrative Tribunals, the legal advisers further considered the matter at their annual meeting in 1999 and decided to adjust their proposed amendment to accommodate the main concern expressed by the Presidents and to provide that the panel shall be composed of judges of the respective Tribunals designated by the Presidents, rather than the Presidents themselves. On balance, however, the legal advisers considered that the approach of amending the statute of the Commission to provide for the possible establishment of an ad hoc advisory panel from which the Commission or participating organizations could seek an advisory opinion represented the best available solution to the problem.

10. At its first regular session of 1999, held on 9 April 1999, the Administrative Committee on Coordination agreed and endorsed the amendment to the statute of the Commission as modified by the legal advisers of the United Nations system. In order to give the Commission an opportunity to provide the General Assembly with its comments on the proposed amendment, the Legal Counsel, by letter dated 11 June 1999, informed the Chairman of the International Civil Service Commission that the Administrative Committee on Coordination had endorsed an amendment to the statute of the Commission and requested that the Commission place the amendment before the General Assembly for its consideration. By letter dated 12 August 1999, the Chairman of the Commission, informed the Legal Counsel that, following an examination of the proposed amendment during its fiftieth session, held in New York from 19 to 30 July 1999, the Commission had decided not to place the proposed amendment before the General Assembly but merely to submit to the Assembly its views thereon. The Commission also requested that, should the Administrative Committee on Coordination decide to submit the proposed amendment to the General Assembly, the

comments of the Commission also be provided to the General Assembly. The comments submitted by the Commission are contained in chapter VI of its report for 1999 to the General Assembly (A/54/30) and in annex II to the present note.

11. In view of the comments made by the International Civil Service Commission, it should be noted that, in its annual report for 1998 (A/53/30), the ICSC had noted with satisfaction that the legal advisers of the United Nations system were examining the possibility of securing a judicial advisory opinion before a decision or recommendation regarding the common system was taken or implemented. The current position of the Commission must also be viewed in the light of the proposed amendment's actual motivation to assist both the Commission and the participating organizations in ensuring the legality of the decisions and recommendations of the Commission prior to their implementation. Moreover, it is the considered view of the participating organizations that it is not the number of decisions that is important, but rather the significant cost involved when a decision or recommendation is overturned upon appeal to one of the Administrative Tribunals. As to the concerns of the Commission regarding the costliness of the advisory panels themselves, it must be recalled that such panels would not be standing bodies, but shall only be established on an ad hoc basis upon a request by the Commission or by the executive head of a participating organization solely for the duration of rendering an advisory opinion on a particular request.

# Annex I

## Draft amendment to the statute of the International Civil Service Commission

**Article 18 *bis***

1. The Commission may request an advisory opinion regarding the legality of any decision or recommendation taken or to be taken under the present statute from an ad hoc advisory panel.

2. The executive head of any of the organizations may request an advisory opinion from an ad hoc advisory panel regarding the legality of any measure based in whole or in part on a decision or recommendation referred to in paragraph 1 which is being considered for adoption or implementation in the organization concerned.

3. An ad hoc advisory panel shall be established upon a request for an advisory opinion by the Commission or an executive head of any of the organizations and shall be composed of a judge of the Administrative Tribunal of the United Nations and of a judge of the Administrative Tribunal of the International Labour Organization, to be designated by the President of the respective Administrative Tribunal, and a third person to be appointed by agreement between the two Presidents, who shall act as Chairman of the Panel.

4. The ad hoc advisory panel shall establish its own procedures, which shall make provision for the representation in any proceedings before the panel of other organizations that so request and of staff representatives on behalf of staff whose rights may be affected by the implementation of the decision or recommendation.

5. Expenses of the ad hoc advisory panel shall be borne by the Commission in the case of a request referred to in paragraph 1 or, in the case of a request under paragraph 2, by the requesting organization or organizations.

# Annex II

## Comments of the International Civil Service Commission on the proposed amendment by the Administrative Committee on Coordination to the statute of the Commission regarding the establishment of advisory panels

### Introduction

1. In a memorandum dated 11 June 1999, the United Nations Legal Counsel informed the Chairman of ICSC that the Administrative Committee on Coordination (ACC) had endorsed an amendment to the ICSC statute proposed by the legal advisers of the United Nations system and requested that the Commission place that amendment before the General Assembly for its consideration.

2. In ACC's view, the proposed amendment to the ICSC statute (see annex VII) would enable the organizations and the Commission to request an advisory opinion from an ad hoc advisory panel on the legality of a decision or recommendation made by the Commission under the authority of its statute before that decision or recommendation was made, or at least before it was implemented by the organizations. The advisory opinion would be given by an ad hoc panel composed of a judge of the United Nations Administrative Tribunal and a judge of the ILO Administrative Tribunal, to be designated by the Presidents of the respective Tribunals, and a third person to be appointed by agreement between the two Presidents, who would act as Chairman of the Panel. The Administrative Tribunals would not be bound by the advisory opinion.

### Views of the organizations

3. The Chairman of CCAQ informed the Commission that the legal advisers of the United Nations system had examined the issue of the establishment of advisory panels for several years. The proposed amendment to the ICSC statute was not meant as a criticism of the Commission or its decisions. On a number of occasions, the executive heads were put in a very difficult position with respect to the implementation of some of the Commission's decisions. On the one hand, the Tribunals wanted the executive heads to ensure the legality of Commission decisions before applying them; on the other hand, if they did not implement a decision of the Commission which they believed to be legally flawed, they could be subject to criticism from the governing bodies of their organizations. Furthermore, when Administrative Tribunals overturned decisions of the Commission, it was sometimes necessary to effect retroactive pay and pension adjustments for large numbers of staff affected by the decision, thereby resulting in significant costs and administrative efforts. Accordingly, the legal advisers decided to recommend to ACC the establishment of advisory panels which would provide advisory opinions, under exceptional circumstances, on the legality of a decision of the Commission.

4. The representative of the United Nations noted that the proposed amendment had been submitted to the Commission on behalf of ACC, not the United Nations, which was only a member of that body. The main problem was the uneasiness felt by executive heads when having to implement decisions which they believed to be legally flawed, and the costs involved in having to rectify the situation. He stressed that the reason why the legal advisers had asked the Commission to submit the proposed amendment to the General Assembly was that by doing so, the Assembly would benefit from the comments and suggestions of the Commission. It was also a matter of courtesy towards the Commission. The proposed solution was not perfect but, in the view of the legal advisers of the United Nations system, it was the best approach. Regarding the scope of the problem, it was not the number of decisions that was important but the fact that when a decision was overturned this was costly to the organizations. He added that the establishment of advisory panels was not a precedent within the United Nations system since the International Court of Justice had the power to render binding as well as non-binding advisory opinions.

### Discussion by the Commission

5. The Commission noted at the outset that neither ICSC nor its secretariat had been consulted by ACC or the legal advisers on the proposed amendment to the ICSC statute. Also, the note from the legal advisers might give the impression that the Commission's decisions were frequently successfully challenged before the Administrative Tribunals of the United Nations system, which was not the case. In fact, the opposite was true. In the vast majority of cases, the Administrative Tribunals had upheld Commission decisions. The Commission doubted the need for referring decisions to the proposed advisory panels, as ICSC would not take a decision which it believed was legally flawed.

6. One member of the Commission favoured the establishment of advisory panels. He pointed out that the

creation of a body which rendered advisory opinions was not a precedent. Such panels existed within and outside the United Nations system, for example, the *Conseil d'Etat* in France.

7. In his view, these panels would add value because they allowed parties, before a decision was made, to obtain an authoritative statement of the law on the legality of the decision.

8. He also stressed that the proposed advisory panels would function properly only if two indispensable conditions were met: (a) the requests for advisory opinions should be limited to decisions that could be challenged before the Administrative Tribunals, and (b) the ad hoc panels should be required to provide the advisory opinions within a short time-frame.

9. Most members of the Commission opposed the establishment of advisory panels. There was no need for such a review mechanism since there were so few Commission decisions and recommendations that had been successfully challenged before the Administrative Tribunals. The legal advisers of the United Nations system had singled out only four such cases in the past 25 years. In some of those cases, flawed legal analysis was not the basis for those challenges.

10. They added that the establishment of advisory panels would result in adding a step in an already long and complex judicial process, and would further delay implementation of ICSC decisions and recommendations, thereby disrupting the system. Since each advisory panel would have to establish its own rules of procedure, there could be lengthy disputes, given the adversarial nature of the cases, at the early stage of the proceedings. The complexity of Commission decisions would also require that the parties be provided sufficient time to prepare their briefs. Currently, the turnaround time for complaints relating to Commission decisions was one year and a half. Even if the advisory panels processed the requests for advisory opinions on a priority basis, it would probably take at least six months to obtain an advisory opinion. This would significantly slow down the Commission's decision-making process.

11. Those members also considered that the usefulness of the advisory panels was doubtful since their advisory opinions would not be binding on the Administrative Tribunals, the organizations and the staff representatives. Staff representatives could very well, even in the face of an unfavourable advisory opinion, lodge a complaint before the Administrative Tribunals on the same issue. Therefore, the advisory opinions would not necessarily be a deterrent to further litigation.

12. Attention was also drawn to the fact that the Presidents and members of the Administrative Tribunals had expressed serious reservations about the proposal for establishing advisory panels. They favoured the option of having the organizations consult the legal advisers of the United Nations system, an approach which was favoured by most members of ICSC. This would ensure that organizations obtained legal views from legal advisers across the system.

13. It was also noted that other than the International Court of Justice, there was no precedent for this type of judicial body within the United Nations system. A further consideration was the added cost in submitting the Commission's views to the advisory panels.

**Decision of the Commission**

14. The Commission decided to submit the above observations on the proposal of ACC to the General Assembly. The Commission decided to request its Chairman to forward those observations to the United Nations Legal Counsel, and to request that should ACC decide to submit the proposed amendment to the General Assembly, it attach ICSC's comments to its submission.